No. 98-424

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In the

Supreme Court of the United States

October Term, 1998

National Solid Waste Management Association,

Petitioner,

vs.

Charles W. Williams as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey as Director of the Minnesota Office of Environmental Assistance,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Respondents sharpen the focus of this case. They concede that Minnesota's regulatory system requires waste processing and proscribes landfilling of public entity waste when the legislative preference scheme prescribed in Minn. Stat. § 115A.02 (1996) has been adopted. Moreover, respondents make no claim that the state pays for the local disposal services being regulated. While they assert that the state has contributed to waste disposal solutions, they do not contend that those funds are used to buy day-to-day disposal services. Instead, local governments, using funds of local taxpayers, pay to dispose of their own solid waste. The state's only claim to market participant status is derivative – through local units of government.[1]

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[1] Respondents point to the existence of one city that has permission to landfill waste, rather than process it as per the county plan. Brief of Respondents at 3 n.3. This is the only local governmental unit with such permission. Such consent does not help respondents, as permission to ship waste to North Dakota was given initially in the 1980's, well before the 1995 legislation that amended Minn. Stat. § 115A.46, subd. 5 and added § 115A.471. (R.A. 3-4.)

East Grand Forks would not be permitted to landfill waste in North Dakota today. Contrary to what respondents imply, see Brief of Respondents at 21 n.6, in 1995 the Minnesota Legislature reacted to the *Carbone* decision by effectively eliminating the possibility that any political subdivision would seek to landfill waste. *See* 1995 Minn. Laws, ch. 247 art. 1 §§ 8-9 (expanding the reach of § 115A.46, subd. 5 and adding § 115A.471).

ARGUMENT

Respondents concede there is a conflict among the circuits, but their claim of a consensus in favor of the position taken below is unpersuasive.

Respondents admit that there is a clear, irreconcilable conflict among the circuits over a state's status as a market participant when it dictates the purchasing activities of local units of government. Brief in Opposition at 9. But review is not necessary, they argue, because there is a "consensus" that Judge Posner and the Seventh Circuit were incorrect in the decision reached in *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984). On closer examination, this supposed consensus is neither compelling, nor foreclosing of the conflict among the circuits.

The first court of appeals to differ with the Seventh Circuit was the Third Circuit in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991). While reaching a market participant conclusion opposite to the Seventh Circuit, the Third Circuit addressed a challenge under the foreign commerce provision of the Commerce Clause. *Id.* at 910-12. By enacting a "Buy American" statute, Pennsylvania raised an issue of the state's potential interference with the federal government's foreign relations power. *Id.* at 913-14. That issue is not raised here. A "Buy American" statute also does not raise the specter of national marketplace "Balkanization" that discrimination against interstate commerce does. Moreover, this Court has reserved the question whether discrimination against foreign commerce requires the same degree of scrutiny as discrimination against interstate commerce. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980).

The Ninth Circuit was the next to address the question raised here. In *Big Country Foods, Inc. v. Board of*

Education, 952 F.2d 1173 (9th Cir. 1992), the court rejected the Seventh Circuit's analysis of market participation. The value of the Ninth Circuit's decision as precedent is limited because the court held that by committing "to pay for the milk," Alaska was a market participant regardless of whether the Anchorage School District was independent of the state. *Id.* at 1180.

Respondents further cite to the Fourth Circuit decision in *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994), as evidence of the supposed consensus they claim exists rejecting *Bernardi*. Respondents do not, however, contest what petitioner demonstrated earlier – that the discussion in *Smith Setzer* rejecting the Seventh Circuit's analysis of the question presented here was pure dicta.

The consensus respondents claim exists is not as strong as they would have this Court believe. The issue is undeniably open in the Fourth Circuit, and *Trojan Technologies* could be viewed as a foreign commerce case. Moreover, the Seventh Circuit's decision in *Bernardi* is not some old case to be left in the dustbin of history. It was authored by one of the preeminent jurists of that court and cited recently in Commerce Clause cases in the Seventh Circuit. *J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745, 748 (7th Cir. 1993); *see Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596 (7th Cir. 1995) (Cudahy, J. concurring).

Regardless of how the cases that form respondents' supposed consensus are viewed, what cannot be ignored is the direct, sharp conflict between the decision in this case and that of the Seventh Circuit. The difference between the Seventh Circuit and the other circuit courts cannot be explained away by this Court's prior market participant precedents. Thus, this case is the appropriate vehicle to address this unsettled question and resolve the conflict.

This case is not to be distinguished from *Bernardi* by any meaningful differences in the autonomy of local units of government.

Respondents attempt to distinguish *Bernardi* on the ground that the Seventh Circuit justified its decision on the autonomy in Illinois of local units of government, while in Minnesota local units of government are said to be subject to a host of restrictions. Brief of Respondents at 17-19. This argument ignores that the circuit courts on which respondents rely did not make any detailed analysis of the degree of autonomy local units of government actually enjoyed. The Third Circuit relegated its discussion of municipal autonomy to a footnote. *Trojan Technologies*, 916 F.2d at 911 n.15. The Fourth Circuit, when rejecting the Seventh Circuit's analysis, did not cite any state law authority. *Smith Setzer*, 20 F.3d at 1319-20. Indeed, the Ninth Circuit cited to California law, but not Alaskan law, to justify its result. *Big Country Foods*, 952 F.2d at 1179 (citing *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1971)).

What the Eighth Circuit did, as in the decisions on which that court relied, was to resort to a hoary formalism from the Nineteenth Century that local units of government exist at the pleasure of the state that created them. *See, e.g., City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868). This rule, called Dillon's Rule, may have once made sense.[2] The sole Minnesota authority the Eighth Circuit relied upon is one that cites Dillon as its first authority. (App at A-8, citing *State ex rel. Erickson v. Gram*, 169 Minn 69, 71, 210 N.W. 616, 616 (1926).) But Dillon's Rule ignores the practical realities of modern municipal government. Today's

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[2] The name derives from a Nineteenth Century scholar of municipal law, John F. Dillon. *See* Barton B. Clark, *Give 'Em Enough Rope: States, Subdivision and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 636 n.123 (1993).

cities, counties and other local units of government must address and resolve complex issues of public finance, public services, public safety and other matters of local concern that belie Dillon's Rule. In meeting these needs, what the Seventh Circuit said about the autonomy of local school districts in Illinois could be said for Minnesota school districts or other local units of government. *Compare Bernardi*, 730 F.2d at 495 *with* Minn. Stat. §§ 123.33 and 123.35 (1996).

Because of these modern day pressures, states – like Minnesota – have devolved power downward to local units of government. In Minnesota, as in many other states, cities and counties can adopt home rule charters that furnish them with a large measure of autonomy in local affairs. *See State ex rel. Town of Lowell v. City of Crookston*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958)("The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld.") These units of government levy taxes, issue bonds, contract for services – the list could go on. *See, e.g.*, Minn. Stat. § 471.345 (1996) (contracts), § 471.57 (1996 (taxes), and § 475.52 (1996) (bonds). That their powers may be regulated by the state does not detract from the large measure of independence local units of government possess. While the question of state preemption of local governmental authority may not have the constitutional dimensions it has in federal-state relations, the question is analytically similar. But it does not follow that because a state, like the federal government, may preempt the authority of a local unit of government, that a local unit of government is merely the alter ego of the state.

This Court's precedents on the Eleventh Amendment and on diversity jurisdiction support the Seventh Circuit's position in *Bernardi*.

Respondents suggest that the distinction the Court has drawn in its Eleventh Amendment jurisprudence between states and cities or other lesser units of government has no application here. They argue that the determination of which governmental entities within a state gain the protection of the Eleventh Amendment has no application to the market participant doctrine. Brief of Respondents at 19.

This argument is misplaced. The Eleventh Amendment may affect the balance of power between the federal government and the states, but so does the Commerce Clause, which protects the federal interest in a robust national market from state protectionism. If cities and counties are merely the alter egos of the state for Commerce Clause purposes, then logically they should fall within the ambit of the Eleventh Amendment. In other words, because the Eleventh Amendment shields states, then it must also shield its instrumentalities. But the amendment does not ordinarily shield cities and counties, and the market participant doctrine likewise should not ordinarily shield state regulation of local procurement decisions that discriminate against interstate commerce. *Cf. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't Nat. Resources*, 504 U.S. 353, 361 (1992) (states "may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through State itself.")

Rather, under the Eleventh Amendment analysis, as well as under the market participant exemption, the determining test is whether the local units of government are indepenent actors from the state. This test is not complicated. The Court followed a straightforward analysis of the question in *Mount Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S.

274 (1977). In *Doyle* the question was whether a local school district was an arm of the state or an independent political subdivision outside Eleventh Amendment protection. While the school district received "guidance" and funding from the state, the district's power to issue bonds and levy taxes made it a political subdivision and not part of the state itself. 429 U.S. at 280.[3]

Similarly, in *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Court rejected a claim by a county that diversity jurisdiction was lacking because it was merely an instrument of the state and thus not a citizen of a state for purposes of diversity jurisdiction. Under California law, the county was an independent body that could sue and be sued, and thus the Court held the county was a citizen of the state and not merely an alter ego of the state. *Id.* at 717-21. These cases show that it is not difficult to determine the independence of a political subdivision for market participant purposes.

The Eighth Circuit's resort to an outdated formalism should be rejected as inconsistent with modern municipal law and the purposes of the Commerce Clause. When local units

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[3] Of particular note in *Doyle* is the Court's reference to Ohio law that distinguished between the state and its political subdivisions. 429 U.S. at 280. The term "State" did not include "political subdivisions," while the latter term encompassed local school districts. 429 U.S. at 280. Here, Minn. Stat. § 115.46, subd. 5 cross-references § 16B.122 for the definition of a public entity covered by the provision. The definition of a public entity in § 16B.122 is as follows:

> "Public Entity" means the state, an office, agency, or institution of the state, the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home rule charter city, a town, a school district, another special taxing district, or any contractor.

Minn. Stat. § 16B.122, subd. 1 (f) (1996). Plainly the legislature intended that cities and counties are not "an office, agency or institution of the state." Thus, as in *Doyle*, these local units of government are not "arm[s] of the State." 429 U.S. at 280.

of government in Minnesota buy waste disposal services with funds they raise themselves, these units of government are the market participants. They, and not the state, will be sued if they do not pay their vendors. It will be the local units of government, and not the state, who will sue the vendors for bad service. When the state tells these local units of government where to buy waste disposal services – that is market regulation. *See Fort Gratiot*, 504 U.S. at 361. If, as here, that regulation discriminates against interstate commerce, it should be subject to Commerce Clause scrutiny. The principles the Commerce Clause protects are best advanced by the position the Seventh Circuit took in *Bernardi* on the question presented here. The Court should grant the petition to resolve the conflict over this important question.

CONCLUSION

For the foregoing reasons and those advanced earlier, petitioner requests that the Court grant the petition for a writ of certiorari to review the decision of the Eighth Circuit in this case.

Respectfully submitted,

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